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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

COMMUNITY ASSOCIATION FOR
RESTORATION OF THE
ENVIRONMENT, INC., a Washington
Non-Profit Corporation; FRIENDS OF
TOPPENISH CREEK, a Washington Non-
Profit Corporation,

and

CENTER FOR FOOD SAFETY, INC., a
Washington D.C. Non-Profit Corporation,

Plaintiffs,

v.

AUSTIN JACK DECOSTER, an individual,
DECOSTER ENTERPRISES, LLC, a
Delaware limited liability company,
AGRICULTURAL INVESTMENT-FUND
II, a Delaware limited liability company,
IDAHO AGRI INVESTMENTS, LLC, an
Idaho limited liability company, IDAHO
DAIRY HOLDINGS, LLC, and Idaho
limited liability company, DRY CREEK
DAIRIES, LLC, an Idaho limited liability
company, WASHINGTON DAIRY
HOLDINGS, LLC, a Washington limited
liability company; WASHINGTON AGRI

Case No. 1:19-cv-3110-TOR

PLAINTIFFS' MOTION FOR AWARD
OF ATTORNEYS' AND EXPERT
WITNESSES' FEES AND COSTS

PLAINTIFFS' MOT. FOR AWARD OF ATTORNEYS' & EXPERT
WITNESSES' FEES AND COSTS

1 INVESTMENTS, LLC, a Washington
 2 limited liability company; DBD
 3 WASHINGTON, LLC, a Washington
 4 limited liability company; *and* SMD, LLC, a
 Washington limited liability company,
 Defendants.

6 Community Association for Restoration of the Environment, Inc. (“CARE”),
 7 Friends of Toppenish Creek (“Friends”), and Center for Food Safety, Inc. (“CFS”
 8 and, together with CARE and Friends, “Plaintiffs”), respectfully request an award
 9 of reasonable attorneys’ and expert witnesses’ fees and costs. This Motion is
 10 brought under the Resource Conservation and Recovery Act’s (“RCRA”) statutory
 11 fee-shifting provision, 42 U.S.C. § 6972(e), the relevant provision in the Consent
 12 Decree, *see* ECF No. 181 ¶ 54, and the parties’ agreement regarding the timing and
 13 schedule of fee motion practice. Declaration of Charles M. Tebbutt (“Tebbutt
 14 Decl.”) ¶ 51.

15 As the Court knows, this citizen suit held an industrial animal operation
 16 accountable for dangerous environmental contamination under RCRA, following
 17 the Court’s seminal decision in *CARE v. Cow Palace. See Cmty. Ass’n for*
 18 *Restoration of the Env’t v. Cow Palace, Ltd. Liab. Co.*, 80 F. Supp. 3d 1180, 1186
 19 (E.D. Wash. 2015). As a result of Plaintiffs’ counsel’s work, Defendants will not
 20

1 only end the waste mismanagement practices that contribute to dangerous nitrate
2 and ammonium contamination of the groundwater, they will—in close concert with
3 Plaintiffs—also undertake a novel remediation investigation and pilot program to
4 eliminate the existing contamination. *See* ECF No. 181 ¶¶ 22-24. That
5 investigation is already underway, with the Washington Department of Ecology
6 signaling its approval on August 14, 2023. Tebbutt Decl. ¶ 43. If successful, the
7 remediation investigation and pilot program will serve as a model for eliminating
8 nitrate and ammonium contamination from CAFOs and other industrial polluters
9 across the country.

10 Having earlier paid \$100,000 in interim fees, Defendants agreed in the
11 Consent Decree to pay an additional interim amount of \$250,000 in fees, which is
12 a fraction of those incurred by Plaintiffs. The parties stipulated that Plaintiffs are
13 the prevailing parties, and the Court entered judgment in Plaintiffs' favor. ECF No.
14 181, ¶ 54; ECF No. 182. Defendants refused the offer of remaining fees made
15 consistent with the Consent Decree, ECF No. 181, ¶ 54, and thus the only dispute
16 before the Court is the remaining amount of fees and costs to which Plaintiffs are
17 reasonably entitled.

18 Plaintiffs request that their attorneys be compensated at reasonable hourly
19 rates that account for the expertise necessary to handle this complex environmental
20

1 litigation. They also request full compensation for the time reasonably expended in
2 this matter, much of which was necessitated by Defendants' litigation tactics.

3 In light of the excellent results achieved in this groundbreaking case,
4 Plaintiffs respectfully request a compensatory attorneys' fee award of \$1,427,565
5 (or higher if out of forum rates are awarded) and \$303,923 in costs, including
6 expert witnesses' fees, for a total award of **\$1,731,488** (or higher), as set forth in
7 **Appendix A** hereto. The \$350,000 already paid to Plaintiffs will be deducted from
8 the total award. ECF No. 181 ¶ 54.

9 BACKGROUND

10 As the Declaration of Charles M. Tebbutt explains, this case was contentious
11 from the start and unusual as it progressed. It required significant motion practice,
12 including briefing on motions to dismiss, discovery issues (including sanctions
13 imposed on Defendants' conduct), and the unsealing of certain documents.
14 Defendants' initial motion to dismiss was largely denied, with the exception of
15 dismissal of two of the LLCs, both of which were later added back into the case.
16 Tebbutt Decl. ¶ 18; *see* ECF No. 40 and ECF No. 134. The case was stayed four
17 different times, *see* ECF Nos. 91, 93, 96, 142, with the stated intent that settlement
18 could be reached—an intention that did not materialize until recently despite
19 significant time and effort by Plaintiffs to reach settlement. The fits and starts of
20

1 the settlement process resulted in seven amended Scheduling Orders, *see* ECF Nos.
2 72, 79, 85, 99, 105, 140, and 150.

3 Due to the extent and numerous sources of Defendants’ dairies’ pollution—
4 including from lagoon seepage, animal operations, composting operations, silage
5 processing, and overapplication of manure to fields—Plaintiffs had to undertake
6 voluminous discovery and extensive expert witness engagement. Plaintiffs’ legal
7 team analyzed tens of thousands of pages of documents, conducted a detailed site
8 investigation pursuant to Rule 34 after an extensive discovery dispute, took seven
9 depositions with more planned, and produced hundreds of pages of expert reports.
10 Tebbutt Decl. ¶ 48; ECF No. 168. In addition, the novelty of the remediation
11 investigation and pilot program required significant further expert engagement, all
12 of which is ongoing and subject to separate funding provisions. Tebbutt Decl. ¶ 56.

13 In addition to this extensive scientific work, Plaintiffs also sifted through
14 substantial discovery related to the corporate documentation for a series of shell
15 LLCs that ultimately led to Defendant, Austin Jack DeCoster. Tebbutt Decl. ¶¶ 18,
16 22-23. While Defendants sought to dismiss a number of corporate entities from the
17 case, as well as Mr. DeCoster himself on personal jurisdiction grounds, the Court
18 ruled for Plaintiffs and kept all of them in the case. ECF No. 134 at 24. As the
19 Court noted, when asked why he was involved with the financial details of the
20

1 Dairies, Mr. DeCoster candidly admitted, “[i]t’s my money.” *Id.* at 15 (citing ECF
2 No. 116-1 at 23).

3 Throughout this litigation, Defendants’ conduct consistently impeded
4 progress and required undue expenditures of time by Plaintiffs. As the Court
5 recognized, “Plaintiffs initiated this litigation in 2019 and Defendants have been
6 engaged in dilatory tactics since its inception.” ECF No. 177 at 10. In particular,
7 Plaintiffs were forced to spend a significant number of hours in making *eleven*
8 separate written requests to Defendants, spanning nearly a year, for missing or
9 incomplete discovery items beginning on March 22, 2022, without ever receiving
10 even close to a full response. ECF No. 162 at 1-6. Defendants’ failures to respond
11 prompted Plaintiffs’ Motion to Compel Discovery Responses and Motion for
12 Sanctions, ECF No. 162, which the Court granted in part, awarding Plaintiff all
13 fees in connection with that motion. ECF No. 177 at 12. Because the Parties then
14 stayed the case again, Plaintiffs held the fee issue in abeyance until now. Plaintiffs
15 thoroughly investigated Defendants’ spoliation of evidence and sought to remedy
16 some of those failures through obtaining phone and computer records, which
17 Defendants opposed. Tebbutt Decl. ¶¶ 22-23. Defendants also vigorously opposed
18 Plaintiffs’ Rule 34 inspection. Tebbutt Decl. ¶¶ 26-27. The Court ultimately
19 intervened, ordering that Plaintiffs be able to proceed with that inspection in a
20 timely fashion. Tebbutt Decl. ¶ 27; ECF No. 61. In addition, the agreement for the

1 third stay was reached upon Defendants’ representation that they would be closing
2 the dairy operations and remediating the property. *See* ECF No. 95 at 2:11-3:10;
3 Tebbutt Decl. ¶ 29. Defendants since reneged on that promise and resumed dairy
4 operations. *Id.*

5 Plaintiffs’ efforts were continuously complicated by Defendants’ unusual
6 and frequent changing of law firms. Tebbutt Decl. ¶¶ 19-21. Throughout the
7 litigation, three different law firms – Marten Law LLP, Lynn Pinker Cox & Hurst,
8 and Sidley Austin LLP – came and went. *Id.* ¶ 18. The Defendants’ principals
9 themselves also proved difficult to track down. John Glessner, who initially took
10 the role of manager and lead contact, disappeared from the case after his deposition
11 in December 2020, only to reappear in 2022 to insert himself as lead negotiator of
12 the terms of a potential settlement. Tebbutt Decl. ¶¶ 19, 22, 23, 30. Despite Mr.
13 Glessner’s admission during deposition that neither his phone nor computer had
14 been searched for responsive records, Mr. Glessner refused to hand them over and
15 hired an Iowa law firm to fight providing those devices even to Defendants’
16 counsel. *Id.* ¶ 23. It remains unclear, and now moot, whether all devices were
17 properly searched.

18 Just two months before trial, the parties agreed to the Consent Decree, later
19 approved by the Court. ECF Nos. 178, 181.

1 While the history above addresses the larger aspects of this case, Plaintiffs
2 respectfully ask the Court award the lodestar requested based on the unusual
3 evolution of this case, the extraordinary results achieved, and the time
4 commitments undertaken to achieve these results.

5 LEGAL STANDARDS

6 The Ninth Circuit endorses the “lodestar” method of calculating the
7 reasonableness of an award of attorneys’ fees, which involves multiplying the
8 number of hours reasonably expended on the litigation by a reasonable hourly rate.
9 *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). In examining
10 the number of hours expended, the Court should “defer to the winning lawyer’s
11 professional judgment as to how much time he was required to spend on the
12 case[.]” *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008). Only
13 those hours which the Court finds are “excessive, redundant, or otherwise
14 unnecessary” should be excluded. *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98
15 1405 (9th Cir. 1992). In complex, protracted litigation such as the one at hand,
16 however, the Ninth Circuit recognizes that some amount of duplicative work is
17 unavoidable: “a lot of legal work product will grow stale,” attorneys must “get up
18 to speed with the research previously performed,” and some “*necessary*
19 duplication” is “inherent in the process.” *Moreno*, 534 F.3d at 1112.

As to the reasonableness of counsel's hourly rates, courts in this circuit ordinarily examine the hourly rates charged for work performed by attorneys of comparable skill, experience, and reputation in the "relevant legal community." *Ingram v. Oroudjian*, 647 F.3d 925, 928 (9th Cir. 2011) (per curiam). As discussed further below, the general rule is that the "relevant legal community" encompasses the forum in which the District Court sits. *Barjon v. Dalton*, 132 F.3d 496, 500 (9th Cir. 1997), but outside forum rates may well be applied. *Id.*

ARGUMENT

I. PLAINTIFFS ARE THE PREVAILING PARTY.

The Consent Decree states: "Plaintiffs shall be considered the prevailing party for purposes of settlement." ECF No. 181 ¶ 54. Accordingly, the typical prevailing party standards need not be addressed in this brief.

II. THE HOURS PLAINTIFFS EXPENDED ARE REASONABLE.

Through September 10, 2023, for the reasons outlined in the declarations and the Background Section above, Plaintiffs' counsel incurred thousands of hours on this litigation, spanning over four years and containing 182 docket entries.¹ Paul

¹ In order to keep further fees and costs to a minimum, Plaintiffs propose that only one supplemental fee and cost bill be submitted within 30 days after the Court's decision on the present application. *See, e.g., Davis v. City & Cnty. of San*

1 Kampmeier, an attorney specializing in complex environmental litigation with over
 2 22 years' experience, reviewed Plaintiffs' attorneys' timesheets and determined
 3 that "all the hours billed are reasonable because they were incurred in reasonable
 4 efforts to win this case and not spent on obviously extraneous tasks." Declaration
 5 of Paul Kampmeier ¶ 27 ("Kampmeier Decl."). Mr. Kampmeier commends
 6 counsel for their able delegation of work, resulting in "very little duplicative time."
 7 *Id.* ¶ 27. Mr. Kampmeier also observes that "the attorneys' fees are what they are
 8 because of Defendants' conduct, not because Plaintiffs' counsel spent an
 9 unreasonable time on the case or on any individual tasks." *Id.* ¶ 30. Mr.
 10 Kampmeier notes that while Defendants did not need to "roll over," they could
 11 have acknowledged the risks that their lagoons and dairy practices were polluting
 12 drinking water and worked to devise solutions. *Id.* ¶ 30. Instead, they used shell
 13 companies to avoid identification, filed meritless motions to dismiss, and engaged
 14 in discovery practices that increased time and cost for all parties. *Id.*

15 Plaintiffs' counsel's contemporaneous time records are sufficiently detailed
 16 to establish their entitlement to compensation for all hours included in this request.

17 _____
 18 *Francisco*, 976 F.2d 1536, 1544 (9th Cir. 1992), *opinion vac. in part on denial of*
 19 *reh'g*, 984 F.2d 345 (9th Cir. 1993) (time spent by counsel establishing right to fee
 20 award is compensable).

1 Accordingly, Plaintiffs request that the Court find that the hours incurred by
2 Plaintiffs' litigation team are reasonable.

3 **III. THE HOURLY RATES PLAINTIFFS REQUEST ARE**
4 **REASONABLE.**

5 As described above, courts in this circuit examine the hourly rates charged
6 for work performed by attorneys of comparable skill, experience, and reputation in
7 the "relevant legal community" when determining the reasonableness of hourly
8 rates. *Ingram*, 647 at 928. While the general rule is that the "relevant legal
9 community" encompasses the forum in which the District Court sits, *Barjon*, 132
10 F.3d at 500, rates outside the forum may be used "if local counsel was unavailable,
11 either because they are unwilling or unable to perform because they lack the degree
12 of experience, expertise, or specialization to handle the case properly." *Id.* (quoting
13 *Gates*, 987 F.2d at 1405).

14 For instance, in a RCRA enforcement action brought in New Jersey, the
15 Third Circuit determined that Washington, D.C. rates should be used, as there was
16 no willing counsel in New Jersey who would have accepted the representation.
17 *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 426 F.3d 694, 706-07 (3d Cir. 2005).
18 Other courts have reached a similar conclusion. *See, e.g., Nat'l Wildlife Fed'n v.*
19 *Hanson*, 859 F.2d 313, 318 (4th Cir. 1988) (hourly rates based on Washington,
20 D.C. market where no attorneys in Raleigh, NC market were capable to take case);

1 *U.S. Pub. Interest Research Grp. v. Stolt Sea Farming, Inc.*, 301 F. Supp. 2d 46, 48
2 (D. Maine 2004) (no attorneys in forum capable of litigating dispute). This Court's
3 Voting Rights Act fee decision is in accord, finding that non-local forum rates are
4 appropriate when local counsel is unavailable within the forum. *Montes v. City of*
5 *Yakima*, 2:12-cv-3108-TOR, ECF No. 186 at 7-9 (June 19, 2015).

6 Plaintiffs show that no lawyers within the forum were capable or willing to
7 represent Plaintiffs in these actions, and that Plaintiffs' counsel, particularly
8 Charlie Tebbutt and Daniel Snyder, have particularized expertise that call for
9 application of national market rates. The fact that attorneys from Seattle, Portland,
10 Dallas and Washington, D.C., were all brought in by Defendants throughout the
11 case, provide further support for awarding non-local forum rates.

12 First, as described by Friends' Executive Director, Jean Mendoza, no other
13 counsel in Washington has been willing to represent Friends in this type of
14 litigation, let alone do so while taking the personal and financial risks that
15 Plaintiffs' counsel shouldered. Declaration of Jean Mendoza ("Mendoza Decl.") ¶¶
16 9.f, 11. Friends believes that "Tebbutt Law is one of the best, if not the best, when
17 it comes to environmental law." *Id.* ¶ 7.

18 Second, there are no local attorneys with the necessary expertise and
19 specialization in federal environmental law, including how such laws apply to
20 CAFOs, who could have or would have successfully represented Plaintiffs in this

lawsuit. *Id.* ¶ 11; Tebbutt Decl. ¶ 35. Mr. Tebbutt notes that he is not aware of any other firms in Washington that would take this or similar CAFO enforcement cases without his firm’s expertise, and that no other such cases have been brought without his firm as lead counsel. Tebbutt Decl. ¶ 35. Co-counsel Toby J. Marshall also notes, “I am not aware of any law firms located in the Eastern District of Washington who have taken on, or would be willing to take on, environmental protection claims against CAFOs without working with Tebbutt Law.” Declaration of Toby J. Marshall (“Marshall Decl.”) ¶ 18. Moreover, there is only a small community of environmental litigators *nationwide* with expertise in CAFOs and the resources necessary to litigate cases of this magnitude and difficulty. Tebbutt Decl. ¶ 35. Because there is an absence of experienced CAFO litigators both in this forum and across the country, the “relevant legal community” for this type of work is the small national community of federal environmental litigators specializing in CAFO-related matters.

The Court considered similar arguments by Plaintiffs CARE and CFS in the *Cow Palace* fee award. *See Cmty. Ass’n for Restoration of the Env’t, Inc. v. Cow Palace, Ltd. Liab. Co.*, No. 13-CV-3016-TOR, 2016 U.S. Dist. LEXIS 92110, at *15-20. (E.D. Wash. Jan. 12, 2016). While this Court stated, with respect to lead counsel Charles Tebbutt, that it was a “close call” whether to apply a non-forum

1 rate, the Court ultimately declined to do so because it remained “too theoretical” to
2 say that no counsel within the Eastern District would take this case. *Id.* at *20.

3 Since that time, the undersigned attorneys, and in particular Messrs. Tebbutt,
4 Snyder, and Ms. van Saun, have been the only attorneys representing plaintiff
5 organizations in similar RCRA enforcement actions against other dairy CAFOs in
6 the Lower Yakima Valley. Tebbutt Decl. ¶ 35; *see, e.g., CARE v. Spring Canyon*
7 *Ranch; CARE v. Sunnyside Dairy; CARE v. View Point Dairy; see also Wash. State*
8 *Dairy Fed'n v. Dep't of Ecology*, 18 Wash. App. 2d 259, 490 P.3d 290 (2021)
9 (overturning State of Washington’s General CAFO Permit issued pursuant to the
10 Federal Water Pollution Control Act for, *inter alia*, failing to protect groundwater
11 from CAFO pollution). Tebbutt Decl. ¶¶ 11-12. To Plaintiffs’ knowledge, no other
12 counsel, whether within or outside this forum, has brought these types of cases in
13 Washington. *Id.* ¶ 35. Ms. van Saun also recognizes the unique expertise of
14 Messrs. Tebbutt and Snyder, stating, “Mr. Tebbutt and his staff, including Dan
15 Snyder, in my experience, are the most knowledgeable CAFO enforcement
16 attorneys in the country.” Declaration of Amy van Saun ¶ 8.

17 Plaintiffs must also underscore that while local attorneys might be *willing* to
18 take the case (none have done so thus far, even after the precedent set in *Cow*
19 *Palace*), their competence to prosecute and get anything near the groundbreaking
20 result here, is purely theoretical. As Ms. Mendoza notes, “[t]o make a comparison

1 to the medical world, we would not hire a general practitioner to perform brain
2 surgery.” Mendoza Decl. ¶ 7. Thus, while a non-forum rate may have been a “close
3 call” nearly seven years ago in *Cow Palace*, Plaintiffs submit that the Court has
4 ample reason to find a different result now, including Tebbutt’s national reputation
5 and case experience. Kampmeier Decl. ¶¶ 15-16; Tebbutt Decl. ¶ 4.

6 In addition to those considerations, Mr. Kampmeier reviewed the hourly
7 rates requested by Plaintiffs, and concluded that they are “commensurate with the
8 hourly rates of other attorneys representing plaintiffs in environmental litigation in
9 the U.S. District Court for the Eastern District of Washington.” Kampmeier Decl. ¶
10 26. Moreover, with regard to Mr. Tebbutt in particular, Mr. Kampmeier noted that
11 an hourly rate of \$640 is “quite reasonable,” and that beyond that rate, “Mr.
12 Tebbutt could seek national rates instead of forum rates given the nature and scope
13 of his practice and his professional expertise.” *Id.* ¶ 18. Accordingly, the rates
14 Plaintiffs seek, whether forum or out-of-forum, are reasonable hourly rates this
15 Court should use in calculating the lodestar. *United Steelworkers of America v.*
16 *Phelps Dodge Corp.*, 896 F.2d 403, 407 (9th Cir. 1990) (affidavits from plaintiff’s
17 attorney and other attorney regarding prevailing fees in relevant legal community
18 are satisfactory evidence of prevailing market rate).

19 The specific rates, total hours, and total amount of fees and costs sought by
20 Plaintiffs’ attorneys are summarized and appended hereto as **Appendix A**. Details

1 are provided in the respective firm declarations, and a full explanation of each
2 column is in Mr. Tebbutt's Declaration. Tebbutt Decl. ¶ 13. The rates requested are
3 based principally on the USAO Attorney's Fees Matrix, which this Court utilized
4 in *Red Lion Hotels Franchising, Inc. v. Century-Omaha Land, LLC*. Case No.
5 2:18-CV-0131-TOR, 2019 U.S. Dist. LEXIS 26152, at *9 (E.D. Wash. Feb. 19,
6 2019). In light of their national experience, and for the reasons set out herein, the
7 rates for Messrs. Tebbutt and Snyder are either at the top locality-adjusted rates for
8 attorneys of their experience or the unadjusted rates, while the other attorneys'
9 rates are below the top locality-adjusted rates. Tebbutt Decl. ¶ 13g. Courts in this
10 district have recently approved rates similar to those sought by Plaintiffs' counsel
11 here. *See, e.g.,* Marshall Decl., Ex. 2 (orders in *Carranza v. Dovex Fruit Co.* and
12 *Valencia v. HomeDeliveryLink, Inc.* approving Mr. Marshall's rate of \$525 per
13 hour).

14 Plaintiffs also point the Court to the adjusted *Laffey* Matrix, a guideline
15 originally designed for the Washington, D.C. legal market to which some courts in
16 this circuit have referred in evaluating the reasonableness of hourly rates,
17 especially where there are attorneys of varying levels of experience involved in the
18 litigation. *See, e.g., San Francisco Baykeeper v. W. Bay Sanitary Dist.*, 2011 U.S.
19 Dist. LEXIS 138093, at *20, 2011 WL 6012936 (N.D. Cal. 2011); *Reed v. Purcell*,
20 2011 U.S. Dist. LEXIS 126321, at *13-14, 2011 WL 5128142 (D. Ariz. 2011);

1 *Theme Promotions, Inc. v. News Am. Mktg. FSI, Inc.*, 731 F. Supp. 2d 937, 948
2 (N.D. Cal. 2010). Those rates are shown in Column I of the attorneys' fees table in
3 **Appendix A**. For an attorney with 20+ years of experience beginning June 1,
4 2023, the *Laffey* Matrix yields an hourly rate of \$1057. The hourly rates requested
5 by all Plaintiffs' counsel are thus *significantly* lower than those recommended by
6 the adjusted *Laffey* Matrix. The Court is, however, also invited to consider using
7 the *Laffey* fee rate for Messrs. Tebbutt and Snyder, as described in Mr. Tebbutt's
8 declaration. Tebbutt Decl. ¶ 13f.

9 Additionally, the Ninth Circuit has articulated a number of factors to be used
10 as guidance by district courts in determining the reasonableness of hourly rates
11 requested by attorneys. *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir.
12 1975). The *Kerr* factors further support the hourly rates sought by Plaintiffs. *Id.*;
13 *Chalmers v. Los Angeles*, 796 F.2d 1205, 1212 (1986) (*Kerr* factors "are largely
14 subsumed within the initial calculation of reasonable hours expended at a
15 reasonably hourly rate[.]"); *Morales v. City of San Rafael*, 96 F.3d 359, 364 n. 9
16 (9th Cir. 1996) (factors 1-4 and 6 are subsumed in lodestar calculation). Many
17 courts have awarded higher hourly rates based on the *Kerr* factors. *See, e.g., Earth*
18 *Island Inst. v. S. Cal. Edison Co.*, 838 F. Supp. 458, 466-67 (S.D. Cal. 1993)
19 (awarding "premium" hourly rate based on the excellent representation provided
20 by counsel); *Nance v. Jewell*, 2014 U.S. Dist. LEXIS 32195, *8-10, 2014 WL

1 948844 (D. Mont. 2014) (awarding \$500/hour for Billings attorney on basis that,
2 *inter alia*, lawyer's skill, experience, and reputation was deserving of such an
3 award); *Kelly v. Wengler*, 7 F. Supp. 3d 1069, 1082 (D. Idaho 2014) (while
4 couched in terms of multiplier, court determined that counsel's quality
5 representation was deserving of higher hourly rate).

6 Here, *Kerr* factors 1-4 and 6, the most relevant of the twelve and those
7 subsumed in the lodestar calculation, support the rates sought by Plaintiffs:

8 *Factor One: The time and labor required.* As described above, the complex
9 legal and factual—including scientific—issues, and novel approach to remediation,
10 required the expenditure of significant hours by Plaintiffs, as did response to
11 Defendants' dilatory tactics and attorney revolving door. The time and labor
12 involved is therefore deserving of the rates sought herein.

13 *Factor Two: The novelty and difficulty of the questions involved.* RCRA
14 imminent and substantial endangerment claims against industrialized dairy CAFOs
15 remain novel, time-consuming, and difficult to prove. Across the country, there are
16 only a handful of similar cases, and most of that handful involve the undersigned
17 attorneys. Moreover, litigation of this case involved substantial difficulty, in large
18 part due to Defendants' tactics and the involvement of numerous corporate entities.
19 This factor further supports Plaintiffs' proposed rates.

1 Factor Three: The skills requisite to perform the legal service properly.

2 Plaintiffs' declarations describe the very limited community of attorneys
3 specializing in enforcement of environmental laws against CAFOs. Kampmeier
4 Decl. ¶ 14; Tebbutt Decl. ¶ 35; Marshall Decl. ¶ 18; Mendoza Decl. ¶¶ 9f, 11.
5 Lead counsel also has a specialized national practice. Tebbutt Decl. ¶ 4; Snyder
6 Decl. ¶¶ 7, 9, 10. Defendants brought in multiple, big city out-of-forum counsel.
7 Tebbutt Decl. ¶ 20. Because specialized skill and experience was required to
8 render the legal services in these cases, the hourly rates sought are reasonable.

9 Factor Four: The preclusion of other employment by the attorney due to
10 acceptance of the case. Plaintiffs' lead counsel devoted substantial working hours
11 to this case over the past four years. Mr. Tebbutt's declaration describes how his
12 firm turned down other potential cases because of the intensity of this case.
13 Tebbutt Decl. ¶ 33.

14 Factor Six: The contingent nature of the fee. Plaintiffs' counsel litigated
15 these matters on a contingent basis. Tebbutt Decl. ¶ 35. This also weighs in favor
16 of the rates sought by Plaintiffs, which will compensate counsel for the risk
17 involved throughout this representation. Kampmeier Decl. ¶¶ 9, 17. Note that
18 Plaintiffs do not ask the Court to "enhance" the lodestar based on the contingent
19 nature of the arrangement, only that it be taken into account in establishing the
20 lodestar. *City of Burlington v. Dague*, 505 U.S. 557, 566-67 (1992).

Outside of the *Kerr* factors, the Supreme Court has made clear that the outcome or result of the lawsuit is one of the main factors to be considered in the lodestar calculation. *Blum v. Stenson*, 465 U.S. 886, 900 (1984). Here, according to Mr. Kampmeier, Plaintiffs obtained “extraordinary” relief that will “force Defendants to do everything possible to control any pollution from the facilities.” Kampmeier Decl. ¶ 32. This case, along with other similar cases, have been discussed by a number of media outlets and legal publications. Tebbutt Decl. ¶¶ 15, 44. Plaintiffs obtained relief that will positively affect hundreds, if not thousands, of individuals living in the Lower Yakima Valley, and the remedial investigation and pilot programs could serve as a model in remediating pollution from thousands of other facilities across the country. Thus, the excellent results achieved in these cases further support the rates sought by Plaintiffs. *Hensley v Eckerhart*, 461 U.S. 424, 435 (1983) (“The result is what matters.”).

IV. PLAINTIFFS’ COSTS ARE REASONABLE.

Plaintiffs seek an award of \$56,234 in non-expert costs thus far incurred (through September 10, 2023) litigating this action. These costs include, *inter alia*, expert fees, laboratory fees, transcript fees, airfare, car rental, lodging, meals, long distance telephone charges, research charges, copying charges, and other expenses directly related to the lawsuits. Tebbutt Decl. ¶ 50. Plaintiffs strove to minimize their compensable costs over the past years. Examples of frugality are provided. *Id.*

1 The costs also include \$13,924 for Mr. Kampmeier's time in advising on this
 2 petition. Kampmeier Decl. ¶ 38. The costs for which Plaintiffs seek compensation
 3 are of the type that would normally be charged to a fee-paying client. *Trs. of the*
 4 *Constr. Indus. & Laborers Health & Welfare Trust v. Redland Ins. Co.*, 460 F.3d
 5 1253, 1257 (9th Cir. 2006). The Court should therefore award Plaintiffs' their full
 6 costs.

7 **V. PLAINTIFFS' EXPERT WITNESSES' FEES AND COSTS ARE**
 8 **REASONABLE.**

9 As part of the overall costs, Plaintiffs seek an award of \$247,689 for their
 10 expert witnesses' fees and costs, contemplated by both the Consent Decree and 42
 11 U.S.C. § 6972(e). Plaintiffs' primary experts, Dr. Nachman, Mr. Erickson, and Dr.
 12 Russelle, were critical to the successful resolution of this case by diagnosing and
 13 exposing the nature and extent of Defendants' pollution, as well as the urgency of
 14 remediating it, as was evidenced during settlement discussions. Tebbutt Decl. ¶ 48.
 15 These experts invested their time into, *inter alia*, reviewing and dissecting
 16 thousands of pages of discovery; planning and executing Plaintiffs' Rule 34
 17 inspection, which provided critical factual information about Defendants' Dairies;
 18 synthesizing data into comprehensive expert reports; analyzing and responding to
 19 Defendants' multiple expert reports (Defendants submitted three expert reports);
 20 and aiding in settlement. Without these experts and their well-informed opinions,

1 Plaintiffs would have been unable to successfully prosecute these cases to finality.
2 In *Cow Palace*, this Court awarded full expert fees to CARE and CFS and stated
3 that “Mr. Erickson [the one expert who provided services in both cases] provided
4 critical sampling services and opinions regarding the contamination throughout the
5 Defendants' facilities, especially contamination from the leaking lagoons.” *Cnty.*
6 *Ass'n for Restoration of the Env't, Inc. v. Cow Palace, Ltd. Liab. Co.*, No. 13-CV-
7 3016-TOR, 2016 U.S. Dist. LEXIS 92110, at *60. (E.D. Wash. Jan. 12, 2016). And
8 while the expert opinions did not ultimately reach the Court here, that fact was
9 merely a consequence of their contributions to the strength of Plaintiffs' case and,
10 consequently, Defendants' willingness to settle on terms favorable to protection of
11 human health and the environment. As such, their fees should be compensated
12 fully.

13 CONCLUSION

14 Due to the precedential nature and excellent results achieved, Plaintiffs
15 respectfully request that the Court grant their requested lodestar award of
16 \$1,427,565 (or higher if out-of-forum rates are awarded) in fees and \$303,923 in
17 costs for a total of **\$1,731,488** (or higher) through September 10, 2023, from which
18 award the \$350,000 already paid by Defendants will be subtracted pursuant to the
19 Consent Decree, ECF No. 181 ¶ 54, along with supplemental fees and costs to be
20 submitted for “fees on fees.”

1 Respectfully submitted this 15th day of September, 2023.

2 /s/ Charles M. Tebbutt

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2023, I electronically filed the foregoing document, together Appendix A thereto, on the Court's CM/ECF filing system, which will automatically serve the following counsel of record:

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/s/ Jonathan D. Frohnmayer
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Appendix A - Fees and Costs

Table 1. Fees										
Attorney	Firm	Years Exp.	USAO Rate 2020-21	USAO Rate 2023-24	USAO Rate 2023-24 (Locality Adjusted)	Rate Requested	Alt. Rate Requested (National)	Laffey Rate 2023-24	Hours	Total Due
Charles M. Tebbutt	LOCMT	35	\$665	\$735	\$640	\$640	\$735	\$1,057	794.7	\$508,608
Daniel C. Snyder	LOCMT/PJ	13	\$532	\$588	\$512	\$512	\$588	\$878	586.6	\$300,339
Jon Frohnmayer	LOCMT	10	\$452	\$499	\$435	\$425		\$777	367.0	\$155,975
Parker Jones	LOCMT	4	\$380	\$420	\$366	\$330		\$437	1,034.3	\$341,319
Andrea Rodgers	LOAKR	21	\$621	\$686	\$598	\$590		\$1,057	12.5	\$7,375
Amy van Saun	CFS	12	\$532	\$588	\$512	\$490		\$878	16.6	\$8,134
Jenny Loda	CFS	11	\$532	\$588	\$512	\$480		\$878	43.7	\$20,976
Amanda Steiner	TM	25	\$621	\$686	\$598	\$590		\$1,057	112.0	\$66,080
Toby Marshall	TM	21	\$621	\$686	\$598	\$590		\$1,057	5.8	\$3,422
Blythe Chandler	TM	13	\$532	\$588	\$512	\$512		\$878	5.3	\$2,714
Eden B. Nordby	TM	2	\$333	\$368	\$321	\$280		\$437	19.4	\$5,432
Subtotal									2,997.9	\$1,420,374
Paralegal/Secretary	Firm	Years Exp.				Rate Requested		Laffey Rate 2023-24	Hours	Total Due
Bradford Kinsey	TM	20+				\$125			2.7	\$338
Jessica A. Langsted	TM	6				\$150		\$239	15.3	\$2,295
Lisa Reed	PJ	20+				\$195		\$239	14.3	\$2,789
Marisela Taylor	LOCMT	20+				\$150			11.8	\$1,770
Subtotal									44.1	\$7,191
Total - Fees									3,042.0	\$1,427,565

Appendix A - Fees and Costs (Cont.)

Table 2. Costs	
Expert Witness	Total Cost
Dave Erickson/WET	\$221,789
Michael Russelle	\$22,300
Keeve Nachman	\$3,600
Subtotal	\$247,689
Litigation: Court/service, Postage, Printing, PACER, Research, etc. & Consulting	Total Cost
Law Offices of CMT	\$26,494
Terrell Marshall	\$15,816
Paul Kampmeier	\$13,924
Subtotal	\$56,234
Total - Costs	\$303,923

Table 3. Grand Total	
Total Fees and Costs Award	\$1,731,488
Amount Paid Previously	\$350,000
Remainder Due	\$1,381,488